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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA - SAN JOSE DIVISION

EBAY, INC.,

Plaintiff,

v.

DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-10

Defendants.

CASE NO.: CV-08-4052 JF

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT BY DEFENDANTS KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING, AND BRIANDUNNING.COM; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF; DECLARATION OF LEO J. PRESIADO

[Compendium of Exhibits filed separately]

[FRCP 12(b)(3) and FRCP 12(b)(6)]

Date: June 26, 2009
Time: 9:00 a.m.
Place: Courtroom 3, 5th Fl.
280 South 1st Street
San Jose, CA 95113

Honorable Jeremy Fogel presiding

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on June 26, 2009, at 9:00 a.m. before the Honorable Jeremy Fogel in Courtroom 3 of the United States District Court for the Northern District of California, located at 280 South First Street, San Jose, California, Defendants Kessler's Flying Circus, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., Todd Dunning, Brian Dunning and BrianDunning.com (collectively, "KFC Defendants") will and hereby do move the Court for an order dismissing the Second Amended Complaint ("SAC") filed by Plaintiff eBay, Inc. ("Plaintiff" and/or "eBay") pursuant to Federal Rule of Civil Procedure 12(b)(3) and 12(b)(6).

This Motion is based on the following: (1) the SAC should be dismissed for improper venue pursuant to Rule 12(b)(3); and (2) the SAC fails to state a claim upon which relief can be granted pursuant to Rule 12(b)(6).

This Motion is based upon this Notice and Motion, the attached Memorandum of Points and Authorities, and all supporting papers including the Declaration of Leo J. Presiado, the Compendium of.Exhibits, all other pleadings and papers on file in this action, and such other arguments and papers as may be permitted by the Court.

DATED: April 27, 2009

Respectfully submitted,

RUS, MILIBAND & SMITH
A Professional Corporation

By: [signature]
LEO J. PRESIADO
Attorneys for Defendants
THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING and BRIANDUNNING.COM

DATED: April 27, 2009

LAW OFFICES OF PATRICK K. McCLELLAN

By: [signature]
PATRICK K. McCLELLAN
Attorneys for Defendant
KESSLER'S FLYING CIRCUS

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

The KFC Defendants[1] jointly file this motion to dismiss under Fed. R. Civ. Proc. 12(b)(3) and 12(b)(6) with regard to Plaintiff eBay, Inc.'s ("Plaintiff" and/or "eBay") Second Amended Complaint ("SAC").

The First Amended Complaint was dismissed as to the KFC Defendants by Order of this Court dated February 24, 2009.[2] The Court dismissed the First Amended Complaint as to the KFC Defendants pursuant to Rule 12(b)(3) on the grounds that the forum selection clause contained in that certain Publisher Service Agreement ("PSA") binds eBay and provides that eBay's claims can only be maintained in the Central District of California and/or the Los Angeles Superior Court. More specifically, the Court ruled as follows:

> ". . . [T]he Non-DPS Defendants [i.e., the KFC Defendants] argue that eBay is bound by the forum selection clause set forth in the PSA. A forum selection clause is presumed to be valid and enforceable absent a showing that 'enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching.' [Citation omitted.] **eBay does not contest the validity of the clause; rather, it asserts that it is not bound by the clause because it is not a signatory to the PSA**. In response, Defendants argue that eBay is bound by the PSA as a third-party beneficiary.
>
> **In the Ninth Circuit, a third-party beneficiary of an agreement is bound by the terms of the agreement, including a valid forum**

[1] The KFC Defendants consist of Defendants Kessler's Flying Circus, BrianDunning.com, Thunderwood Holdings, Inc., Dunning Enterprise, Inc., Brian Dunning and Todd Dunning. Individual Defendant names will be used in this brief to the extent context requires.

[2] A true and correct copy of the Order (1) Granting Motions to Dismiss for Improper Venue and (2) Granting In Part Motion to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted, dated February 24, 2009 ("Order") is attached to the KFC Defendants' Compendium of Exhibits ("Compendium") as Exhibit "1."

selection clause. [Citation omitted.] Defendants argue that while eBay may not be an actual signatory to the PSA, eBay does enter into a supplemental Terms and Conditions ('T&C') Agreement with advertising affiliates. The T&C Agreement appears to supplement the PSA, reciting in relevant part as follows:

In consideration for Your participation in the Affiliate Program (the 'Program') maintained by eBay Inc. ('eBay') through Commission Junction ('CJ'), You agree to comply with these Supplemental Terms and Conditions ('Terms and Conditions') in addition to the terms of the Commission Junction Publisher Service Agreement ('PSA'). If any of these Terms and Conditions conflict with those of the PSA, then these Terms and Conditions will control. Capitalized terms not defined herein have the meanings set forth in the PSA.

Foreman Decl. Ex. 2. **This language in the T&C Agreement, when read together with eBay's own allegations in the FAC with respect to the role of the PSA, indicates that eBay is a third-party beneficiary of the PSA.** Pursuant to the PSA, advertising affiliates earn revenue by 'promoting Advertisers,' including eBay. *See* PSA at 1. Indeed, the T&C Agreement appears expressly to incorporate the terms of the PSA. [Citation omitted.] " (Order at 6:12 to 7:10, emphasis added.)

The Court also determined that eBay did not establish that the forum selection clause in the PSA is superseded by the eBay's "User Agreement" as argued by eBay at oral argument:

"At oral argument, eBay contended that a separate 'user agreement' supersedes the forum selection clause of the PSA. *See* Hr'g Tr. 25-26, Dec. 12, 2008. **However, the FAC does not explain how violation of the user agreement is unrelated to the alleged breach of the PSA or**

> **why the PSA should not be considered the primary and controlling agreement for all claims related to the PSA. Moreover, the FAC only alleges that individual Defendants Shawn Hogan, Brian Dunning, and Todd Dunning entered into the user agreement.** *See* FAC ¶35. Accordingly, while eBay has met its burden of showing that venue would be proper in this district in the absence of an applicable forum selection clause, **it has failed to present sufficient allegations as to why it is not bound by the forum selection clause contained in the PSA. The Central District of California and/or the Los Angeles Superior Court would provide an alternate and viable forum to bring claims against the Non-DPS Defendants**. [Citation omitted.] Accordingly, the motion to dismiss by the Non-DPA Defendants for improper venue will be granted, with leave to amend." (Order at 7:14 to 8:1, emphasis added.)

As set forth below, eBay does not (and cannot) present sufficient allegations establishing that it is not bound by the forum selection clause contained in the PSA. On this ground alone, the SAC should be dismissed without leave to amend.

Notwithstanding the propriety of dismissal for improper venue, the allegations in the SAC reveal that eBay's claims are time-barred by the contractual limitations period set forth in the PSA. In the event the Court is not inclined to dismiss the SAC for improper venue, the SAC should be dismissed without leave to amend for failure to state a claim because eBay's claims are time barred.

Finally, but by no means least, the claims alleged in the SAC are barred because were previously released by eBay as against the KFC Defendants. Indeed, eBay's admitted agent, Commission Junction, Inc. ("CJ") within the last month expressly released all claims relating to the PSA **on behalf of eBay and affirmed its authority to do so** in settlement of a state court action pending in the County of Orange, State of California which alleged the same wrongful conduct against the KFC Defendants as alleged in the SAC.

In sum, eBay has failed to (and cannot) cure the failure to allege facts establishing proper venue in this District and the SAC fails to state a claim upon which relief can be granted because the claims alleged in the SAC are both time barred and have otherwise been expressly released. As such, the SAC should be dismissed without leave to amend.

2. ARGUMENT

A. The SAC Should be Dismissed for Improper Venue

In connection with a Motion under Rule 12(b)(3) the Court need not accept as true the allegations of the SAC, and it may consider evidence from any party outside the pleadings themselves. *Murphy v. Schneider National, Inc.*, 362 F. 3d 1133, 1137 (9th Cir. 2004). As the Court noted in its Order, "ultimately the plaintiff bears the burden of showing that venue is proper. *Piedmont Label, Co. v. Sun Garden Packing Co.*, 598 F. 2d 491, 496 (9th Cir. 1979)." (Order, at 5:4-5.) Moreover, forum selection clauses are ***presumed valid*** under federal law and enforcement will be ordered unless it clearly would be "unreasonable and unjust, or the clause was invalid for such reasons as fraud or over-reaching." *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972); *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 512 (9^{th} Cir. 1988).

As set forth in the Order, this Court has already determined that based on the allegations in the First Amended Complaint regarding the role of the PSA and the language of the T&C Agreement (which expressly incorporates the terms of the PSA) eBay is a third party beneficiary of the PSA, and is bound by the venue selection clause contained in the PSA.[3] Nothing alleged in the SAC contradicts this finding by the Court. To the contrary, the allegations of the SAC affirm that eBay's claims derive from the KFC Defendants' participation in eBay's Affiliate Marketing Program – the terms of which are governed by the PSA and the T&C Agreement (to which eBay is admittedly a party) which expressly incorporates the terms of the PSA.

Paragraphs 18 through 23 of the SAC, which follow the sub-heading "eBay's

[3] True and correct copies of the PSA and the T&C Agreement are attached to the Compendium as Exhibits "2" and "3," respectively.

Affiliate Marketing Program," describe the intent, purpose and mechanics of eBay's Affiliate Marketing Program. Most significantly, eBay alleges that the Affiliate Marketing Program is designed to increase traffic to eBay by the placement of advertisements for eBay by third party affiliates such as the KFC Defendants. (SAC at ¶19). Such affiliates are compensated by eBay under the Affiliate Marketing Program when the affiliate advertisement causes an internet user to take some action at eBay's site resulting in revenue to eBay or is likely to result in revenue to eBay in the future. (SAC at ¶19). In addition, eBay and/or its agent, CJ, tracked affiliate compensation under the Affiliate Marketing Program and CJ, on behalf of eBay, administered the Affiliate Marketing Program. (SAC at ¶19:12-14 and ¶20). Finally, eBay alleges that "CJ pays affiliates on a periodic basis (usually monthly) with funds remitted by eBay, based on the number of Revenue Actions taken by users referred by those affiliates."(SAC at ¶23).

Although the SAC references neither the PSA nor the T&C Agreement (as was the case with the First Amended Complaint), it is undisputed that the terms of the PSA and the T&C Agreement (which expressly incorporates the terms of the PSA) governed the KFC Defendants' participation in eBay's Affiliate Marketing Program:

eBay Terms and Conditions

eBay Affiliate Program – Supplemental Terms and Conditions

> "In consideration of Your participation in the Affiliate program maintained by eBay Inc. ('eBay') through Commission Junction, Inc. ('CJ'), You agree to comply with these Supplemental Terms and Conditions ('Terms and Conditions') in addition to the terms of the Commission Junction Publisher Service Agreement ('PSA')." (T&C Agreement at p.1).

* * *

Commission Junction Publisher Service Agreement

> "The Advertiser [i.e., eBay] compensates the Publisher [i.e., the KFC Defendants], in accordance with this Agreement."

Nothing alleged in the SAC contradicts the fact that the KFC Defendants' participation in eBay's Affiliate Marketing Program derives from the PSA and the T&C Agreement. Indeed, eBay does not dispute (because it cannot dispute) that but for the KFC Defendants' participation in eBay's Affiliate Marketing Program, the KFC Defendants would have no reason to participate in the alleged cookie stuffing scheme which eBay alleges caused eBay to pay unauthorized commissions to the KFC Defendants under the PSA.

The allegations of the SAC establish that each of the claims alleged in the SAC derive from the KFC Defendants' participation in the Affiliate Marketing Program, and more specifically the allegations that the KFC Defendants' alleged cookie stuffing scheme was designed to cause eBay to pay unauthorized commissions to the KFC Defendants. Indeed, each of the claims alleged in the SAC contain an allegation that the KFC Defendants' alleged cookie stuffing scheme damaged eBay.

In short, but for the KFC Defendants' participation in eBay's Affiliate Marketing Program via the PSA and the T&C Agreement, eBay would have no claims against the KFC Defendants. As set forth below, eBay's attempt to allege that its claims derive primarily from the "User Agreement" allegedly entered into by the KFC Defendants is absurd.

B. eBay's Claims Do Not Derive From The User Agreement

In dismissing the First Amended Complaint, the Court did not find persuasive eBay's argument that the User Agreement entered into by the individual KFC Defendants supersedes the forum selection clause of the PSA. Indeed, as cited above, the Court specifically determined that "the FAC does not explain how violation of the user agreement is unrelated to the alleged breach of the PSA or why the PSA should not be considered the primary and controlling agreement for all claims related to the PSA. . . [eBay] has failed to present sufficient allegations as to why it is not bound by the forum selection clause contained in the PSA." (Order at 7:15-18 and 21-22). EBay has not corrected (because it cannot correct) this deficiency.

In the SAC eBay alleges at Paragraph 16 that "[p]ursuant to the User Agreements entered into by [the KFC Defendants], as discussed in paragraph 26 *infra*, [the KFC Defendants] have consented to the jurisdiction of and venue in the Northern District of California." eBay goes on to allege in Paragraph 16 that "under the User Agreements, the Defendants have agreed that any claim or controversy at law or equity that arises out of this Agreement or eBay's services must be resolved by a court located in Santa Clara County, California."

At Paragraph 26 of the SAC eBay provides its purported explanation as to why the User Agreement should be considered the primary or controlling agreements as to its claims. However, eBay neither attaches nor quotes any User Agreement. Moreover, eBay does not mention the PSA nor otherwise attempt to explain how purported violations of the User Agreement are unrelated to the KFC Defendants' alleged breach of the PSA or why the PSA should not be considered the primary and controlling agreement for all claims related to the PSA. eBay simply ignores the PSA in the portion of the SAC that it contends explains the propriety of venue in the Northern District of California.

At Paragraph 26 eBay "explains" the connection to the User Agreement as follows: (1) software allegedly created by the KFC Defendants caused unidentified internet users to access eBay website in an unauthorized way, (2) such access by unidentified internet users was unknown to the internet users and is attributable to the KFC Defendants, (3) the alleged access by unidentified internet users attributable to the KFC Defendants violates the User Agreements entered into between the individual KFC Defendants and eBay on November 10, 2000 (Brian Dunning) and May 21, 2003 (Todd Dunning), and (4) each cause of action alleged in the SAC arises out of this alleged unauthorized access by unidentified internet users allegedly attributable to the KFC Defendants. This "explanation" falls short of the explanation requested of the court in the Order.

eBay fails to explain how the alleged violation of the User Agreement as described by eBay is unrelated to the alleged breach of the PSA such that it supersedes the PSA as the primary document underlying eBay's claims. As set forth above, the allegations of the SAC establish that each of the claims alleged in the SAC derive from the KFC Defendants' participation in the Affiliate Marketing Program, and more specifically that the KFC Defendants' alleged cookie stuffing scheme was designed to cause eBay to pay unauthorized commissions to the KFC Defendants under the PSA. It cannot be reasonably disputed that but for the KFC Defendants' participation in eBay's

Affiliate Marketing Program via the PSA and the T&C Agreement, the KFC Defendants could not have bilked commissions from eBay under the PSA as alleged by eBay. eBay does not, because it cannot, allege that the User Agreement has any connection to the PSA and the payment of commissions to the KFC Defendants thereunder. All of eBay's claims are related to the KFC Defendants participation in the Affiliate Marketing Program via the PSA and the T&C Agreement which expressly incorporates the terms of the PSA. Nothing in the SAC contradicts this.

The fact that eBay's claims are related primarily to the KFC Defendants' participation in the Affiliate Marketing Program via the PSA and the T&C Agreement is further evidenced by the discovery requests served by eBay on January 22, 2009. ***Practically every request for documents, special interrogatory and request for admission served by eBay references eBay's Affiliate Marketing Program***.[4] By way of example:

> REQUEST FOR ADMISSION NO. 6:
>
> Admit that KFC participated in an eBay Affiliate Marketing Program or programs.
>
> REQUEST FOR ADMISSION NO. 11:
>
> Admit that, while participating in an eBay Affiliate Marketing Program or Programs, KFC utilized software programs and/or code that performed Cookie Stuffing.
>
> REQUEST FOR ADMISSION NO. 23:
>
> Admit that KFC received commissions from eBay, whether directly or through Commission Junction, that were based, in whole or in part, Cookie Stuffing caused by KFC.

* * *

[4] True and correct copies of eBay's First Request for Admissions, First Set of Special Interrogatories and First Request for Documents served on Defendant KFC are attached to the Compendium as Exhibits "4" through "6," respectively.

INTERROGATORY NO. 1:

Identify all persons or entities with knowledge regarding KFC's participation, manipulation or interaction in any Affiliate Marketing Program including eBay's Affiliate Marketing Programs including, but not limited to, all methods, techniques and technologies, software, source code, Javascript and HTML code, used by KFC to obtain revenue from, or otherwise interact with, participate in or manipulate any Affiliate Marketing Program.

* * *

REQUEST FOR PRODUCTION NO. 3:

All documents relating to payment of commissions or other revenue obtained by KFC through participation in, interaction with or manipulation of eBay's Affiliate Marketing Program.

REQUEST FOR PRODUCTION NO. 4:

All documents relating to eBay's Affiliate Marketing Program, including, but not limited to, all methods and technologies used by KFC to obtain revenue from, manipulate or otherwise interact with, eBay's Affiliate Marketing Program, including, but not limited to, all software, source code, Javascript, and HTML code.

What is more, ***not a single discovery request propounded by eBay on Defendant KFC mentions a User Agreement***. As such, it cannot be reasonably disputed that regardless of what is alleged in the SAC, eBay admits through its discovery requests that its claims are related to the KFC Defendants participation in the Affiliate Marketing Program via the PSA. The PSA underlies eBay's claims alleged in the PSA and is not superseded by the User Agreement.

C. Even If eBay Establishes That Its Claims Arise To Some Extent From The User Agreement (Which It Cannot), The User Agreement Does Not Contain An Effective Forum Selection Clause

As set forth above, eBay cannot reasonably deny (and has at least tacitly admitted) that the claims alleged in the SAC arise from the KFC Defendants' participation in the Affiliate Marketing Program via the PSA and T&C Agreement. Even if eBay were to establish that its claims also arise from the User Agreement (which it cannot, and has not), the User Agreement does not contain an effective forum selection clause as to this action.

eBay's User Agreement can be found on eBay's website.[5] eBay's User Agreement (which eBay does not attach to the SAC) provides that it "is effective for current users" as of August 13, 2008. (User Agreement at "Introduction.") This action was commenced by eBay against the KFC Defendants on August 25, 2008. As such, as of the commencement of this action, the August 13, 2008 User Agreement was effective regardless of when eBay alleges any of the KFC Defendants entered into a User Agreement.

In the SAC, eBay alleges that "under the User Agreement, the Defendants have agreed that any claim or controversy at law or equity that arises out of this Agreement or eBay's services must be resolved by a court located in Santa Clara County, California." (SAC at ¶16). ***This allegation is false***. The User Agreement actually provides the following language with respect to venue selection:

> "You agree that any claim or dispute ***you may have against eBay*** must be resolved by a court located in Santa Clara County, California."(User Agreement at "Resolution of Disputes - Law and Forum of Disputes," emphasis added).

Therefore, the forum selection clause in the User Agreement ***only applies to claims brought against eBay***. It seems eBay did not want to limit venue as to any claims it may bring against any User. As such, even if eBay were to establish that its claims also arise to some extent from the User Agreement (which it cannot, and has not), the User Agreement does not contain an effective forum selection clause as to this action.

---

[5] A true and correct copy of the eBay User Agreement is attached to the Compendium as Exhibit "7."

D. The Venue Selection Clause In The PSA Requires That The Case Be Dismissed And Not Transferred

The wording of a forum selection clause may properly limit litigation to particular courts within a state: e.g., to state courts rather than federal district courts located in the state. *American Soda, LLP v. U.S. Filter Wastewater Group, Inc.*, 428 F. 3d 921, 926 (10th Cir. 2005) ("Courts of the State of Colorado" meant state courts not federal courts); *see also, Milk N' More Inc. v. Beavert*, 963 F. 2d 1342, 1345 (10th Cir. 1992). The forum selection clause in the PSA limits litigation to state courts in Los Angeles except to the extent "federal courts have exclusive jurisdiction." In the event the federal court has exclusive jurisdiction, litigation is limited to federal court in Los Angeles. Paragraph 9(d) of the PSA provides as follows:

> "This Agreement is governed by the laws of the State of California (USA), except for its conflict of law provisions. ***The exclusive forum for any actions related to this Agreement shall be in the state courts, and, to the extent that federal courts have exclusive jurisdiction, in Los Angeles, California. The parties consent to such venue and jurisdiction*** and waive any right to a trial by jury." (Emphasis added.)

Federal courts do not have exclusive jurisdiction over the federal claims alleged by eBay in the Complaint. As such, ***the claims alleged by eBay can only be brought in state court in Los Angeles***. There are some matters that are within the exclusive jurisdiction of the federal courts, but these are very few. Most claims, including most federal question claims, are subject o the concurrent jurisdiction of federal and state courts. *Gulf Offshore Co. v. Mobile Oil Corp.*, 453 U.S. 473, 478 (1981). Indeed, in considering the propriety of state court jurisdiction over any federal claim, it is presumed that state courts enjoy concurrent jurisdiction. That presumption can only be rebutted by an explicit statutory directive confining jurisdiction to federal courts or by clear incompatibility between state court jurisdiction and federal interests. *Gulf Offshore*, *supra,* 453 U.S. at 478.

It is well settled that both federal law claims alleged by eBay in the SAC are subject to the concurrent jurisdiction of the state and federal courts. First, the CFAA does not contain an explicit directive conferring exclusive jurisdiction and it has otherwise been held that no exclusive federal jurisdiction exists as to civil actions under the CFAA. *H&R Block Tax Services, Inc. v. Riviera-Alicea*, 570 F. Supp. 255, fn. 5 (D.P.R. 2008), *citing, Prominent Consulting LLC v. Allen Bros.*, 543 F. Supp. 2d 877, 884 (N. D. Ill. 2008). Likewise, civil RICO claims are not within the exclusive jurisdiction of the federal courts. The seminal Ninth Circuit case on the issue is *Lou v. Belzberg*, 834 F. 2d 730, 735 (9th Cir. 1987). The *Lou* court determined that although there are persuasive arguments both for and against concurrent jurisdiction, "the stronger arguments favor concurrent jurisdiction" as to civil RICO claims.

Therefore, the subject venue selection clause ***requires that the case be dismissed*** since it cannot be brought in federal court. To the extent eBay re-files the claims alleged in the SAC against the KFC Defendants, such claims can only be filed in state court located in Los Angeles.

3. THE SAC SHOULD BE DISMISSED BASED ON THE LIMITATIONS PROVISION IN THE PSA

This motion under Rule 12(b)(6) looks to determine whether the SAC contains allegations sufficient to state claims for which the Court may grant relief even if the allegations and reasonable inferences from them are reviewed in plaintiff's favor. *Display Research Laboratories, Inc. v. Telegen Corporation*, 133 F. Supp. 2d 1170 (N.D. Cal. 2001). In addition to the allegations in the SAC, the Court may consider in a Rule 12(b)(6) motion matters for which authenticity is not questioned and on which the complaint necessarily relies. *Parrino v. FHP, Inc.,* 146 F.3d 699, 706 (9th Cir. 1998); *In Re Stacs Elecs. Sec, Liting*. 89 F.3d 1399, 1405 n.4 (9th Cir. 1996). Therefore, the Rule 12(b)(6) motion is based on the contents of the PSA which has previously been accepted and relied on by this Court.

Just as the PSA governs the questions of the proper venue, it also provides the period of time in which actions may be brought among CJ, eBay and the KFC Defendants based on claims relating to eBay's Affiliate Marketing Program. Paragraph 7(a) of the PSA states the contractual limitation period as follows:

> "NO ACTION, SUIT OR PROCEEDING SHALL BE BROUGHT AGAINST THE OTHER PARTY TO THIS AGREEMENT MORE THAN ONE YEAR AFTER THE TERMINATION OF THIS AGREEMENT." (Formatted as in original text.)

As set forth above, the T&C Agreement expressly incorporates the terms of the PSA. It is undisputed that eBay is a party to the T&C Agreement. In any event, with respect to the PSA, it is settled law that a third-party beneficiary is bound by all provisions of the contract, including the contractual limitations provision in the contract. *Janet Perez-Encinas v. Amerus Life Ins. Co.,* 468 F. Supp 2d. 1127, 1134 (N.D. Cal. 2006) (Judge Breyer); *Skylawn and Skyview Memorial Lawn v. Superior Court,* (1979) 88 Cal. App. 3d. 316, 319. A third-party beneficiary must take the limitations provision in the contract when the beneficiary seeks to enforce rights or obtain recovery based on the contract. *See, L.E. Sanders v. American Casualty Company*, (1969) 269 Cal. App. 2d. 306, 309. A third-party beneficiary cannot have any greater rights under the contract than the other parties. *Skylawn, supra.* at 319. *Downey v. Federal Express Corporation,* 1993 U.S. Dist. LEXIS 16114, at *7 (N.D. Cal. 1993) (Judge Patel). The Court is bound to interpret this limitations provision in its "ordinary and popular sense and give it the meaning a "layperson would ordinarily attach to it." *Perez-Encinas, supra.* at 1133. Cal. Code of Civ. Proc. §§ 1638 and 1644.

Since eBay terminated the KFC Defendants from its Affiliate Marketing Program on June 19, 2007 (SAC ¶ 57), it was required to commence this action on or before the end of the day on June 19, 2008, pursuant to this contractual limitation provision. The meaning of this phrase is plain—"NO ACTION" means these parties cannot sue each other after an agreed upon date for any claim requiring an application of the terms of this contract. eBay did not file this lawsuit until August 25, 2008, which is beyond one year from termination.

There is no unfairness in applying this contractual limitation to eBay's claim since it expressly adopted the terms of the PSA and even presumably had the opportunity to modify that provision through the T&C Agreement. Furthermore, the SAC reveals that eBay knew as of the date of termination all facts giving rise to its claims. (SAC ¶ 60) Therefore, the entire SAC should be dismissed under Rule 12(b)(6) without leave to amend because all of its claims are time barred.

4. THE SAC SHOULD BE DISMISSED BECAUSE ALL OF THE CLAIMS ALLEGED IN THE SAC HAVE BEEN RELEASED AS AGAINST THE KFC DEFENDANTS

As this Court previously noted in the Order, CJ (eBay's agent for the purposes of eBay's Affiliate Marketing Program) previously sued the KFC Defendants in state court in Southern California (the "State Court Action"). [6]As also noted in the Order "**the issues in the [State Court Action] arose out of the same conduct alleged in [eBay's] FAC**, with Commission Junction seeking a return of fees paid to [the KFC Defendants] on the grounds that such fees were improperly credited because of the cookie stuffing scheme described above." (Order at 3:12-21), (emphasis added.)

In the SAC eBay affirms that CJ was its agent for the purposes of administering eBay's Affiliate Marketing Program, including preventing and detecting fraudulent activities and paying commissions under the PSA:

> 20. At all relevant times, eBay used the services of CJ, a subsidiary of ValueClick, Inc., in administering the Affiliate Marketing Program. The relationship between eBay and CJ was governed at all relevant times by various Advertiser Service Agreements. Under those agreements, CJ was responsible for, among other things, recruiting affiliates, tracking affiliate traffic, monitoring compliance by affiliates, preventing and detecting fraudulent activity, and paying affiliates using funds remitted by eBay.
>
> * * *
>
> 23. As part of the services it renders with respect to eBay's Affiliate Marketing Program, CJ pays affiliates on a periodic basis (usually

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[6] A true and correct copy of the Second Amended Complaint filed by CJ in the State Court Action is attached to the Compendium Exhibit "8."

monthly), with funds remitted by eBay, based on the number of Revenue Actions taken by users referred by those affiliates.

The State Court Action was dismissed with prejudice on March 23, 2009.[7] The parties to the State Court Action entered into a Settlement and Mutual General Release Agreement (the "Settlement Agreement").[8] Pursuant to the Settlement Agreement eBay's acknowledged agent, CJ, released the KFC Defendants on behalf of itself and eBay as its principal in connection with the Affiliate Marketing Program as follows:

> 4. Releases by CJI. With the exception of the obligations of the KFC Parties under this Agreement, ***CJI, together with their principals***, agents, attorneys, representatives, subsidiaries, parents, assigns, successors, and predecessors (the "CJI Releasors") hereby absolutely, fully and forever releases, relinquishes and discharges the KFC Parties, together with their principals, agents, attorneys, representatives, subsidiaries, parents, assigns, successors, and predecessors (the "KFC Releasees") from any and all claims, debts, actions, obligations, liabilities, demands, damages, losses, costs, attorneys' fees, interests and expense of any kind or nature, character and description, whether known or unknown, whether suspected or unsuspected, whether fixed or contingent, which the CJI Releasors have held or now hold against the KFC Releasees arising from or related to the Action or any claim which could have been alleged in the Action, or otherwise arising from or related to the relationship between the CJI Releasors and the KFC

[7] A true and correct copy of the entered dismissal is attached to the Compendium as Exhibit "9." The KFC Defendants request that the Court take judicial notice of the fact of the dismissal of the State Court Action with prejudice.

[8] A true and correct copy of the Settlement and Mutual General Release Agreement, which is part of the court record in the State Court Action, is attached to the Compendium as Exhibit "10." The KFC Defendants request that the Court take judicial notice of the content of the Agreement.

Parties, from the beginning of time to the date of execution of this Agreement (the "CJI Released Claims"). The CJI Releasors acknowledge that they have been advised by legal counsel and are familiar with the provisions of California Civil Code Section 1542, which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED SETTLEMENT WITH THE DEBTOR."

The CJI Releasors, being aware of this code section, expressly waive to the maximum extent permissible under the law, any rights they may have thereunder, as well as under any other statutes or common law principles of similar effect.[9]

The Settlement Agreement expressly provides that CJ has the authority to execute the Settlement Agreements on behalf of its principals including eBay and bind eBay as to its terms including the releases:

19. Authority of Signatories. Each person signing this Agreement on behalf of a Party, Releasor and/or the Releasee represents and warrants to the other Party, Releasor and/or Releasee that such person has the authority to execute and bind the Party, Releasor and/or Releasee on whose behalf such signatory is signing and that no other person or entity is required to sign this Agreement to make the Agreement fully

[9] The "KFC Parties" are defined as the KFC Defendants in the Settlement Agreement.

enforceable against and binding upon such Party, Releasor and/or Releasee.

It is well established that an agent can, and does bind its principal to the extent it purports to do so to a third party, particularly while acting within the scope of its apparent authority. *Lippert v. Bailey* (1966) 241 Cal.App.2d 376, 382 (An agent may alter the principal's legal relationship when acting within the scope of its agency and may enter into contracts which bind the principal and so create legal obligations that the principal must fulfill); *CPI Builders, Inc. v. Impco Technologies, Inc.* (2002) 94 Cal.App.4th 1167, 1174. In this case there is no question that CJ acted as the agent of eBay as to the administration of eBay's Affiliate Marketing Program, including preventing and detecting fraudulent activities and paying commissions under the PSA. As such, the claims alleged in the SAC are barred because the claims have been unconditionally released as against the KFC Defendants.

5. CONCLUSION

Based on the foregoing, the KFC Defendants respectfully request that the SAC be dismissed in its entirety with prejudice.

DATED: April 27, 2009

Respectfully submitted,

RUS, MILIBAND & SMITH
A Professional Corporation

By: [signature]
LEO J. PRESIADO
Attorneys for Defendants
THUNDERWOOD HOLDINGS, INC., BRIAN DUNNING and BRIANDUNNING.COM

DATED: April 27, 2009

LAW OFFICES OF PATRICK K. McCLELLAN

By: [signature]
PATRICK K. McCLELLAN
Attorneys for Defendant
KESSLER'S FLYING CIRCUS

DECLARATION OF LEO J. PRESIADO

I, LEO J. PRESIADO, declare as follows:

1. I am an attorney at law duly licensed to practice before the above-entitled Court and am a member of the law firm of Rus, Miliband & Smith, A Professional Corporation ("RMS"), attorneys of record for Defendants Thunderwood Holdings, Inc., Brian Dunning and BrianDunning.com (collectively, "Defendants").

2. I have firsthand personal knowledge of the matters set forth herein and if called upon as a witness would and could competently testify thereto.

3. In addition to this action, RMS was counsel of record for Brian Dunning and Thunderwood Holdings, Inc. in that certain state court action commenced by Commission Junction, Inc. ("CJ") on January 4, 2008 in the Superior Court of the State of California as Case No. 30-2008 00101025 (the "State Court Action").

4. Attached as Exhibit "1" to the Compendium of Exhibits ("Compendium") filed by Defendants in support of the Motion is a true and correct copy of the Order (1) Granting Motions to Dismiss for Improper Venue and (2) Granting in Part Motion to Dismiss for Failure to State a Claim Upon Which Relief Bay Be Granted, dated February 24, 2009 ("Order").

5. Attached as Exhibit "8" to the Compendium is a true and correct copy of the Second Amended Complaint filed by CJ in the State Court Action together with Exhibits "A" and "B" attached thereto.

6. Exhibit "A" (the Publisher Services Agreement) to the Second Amended Complaint filed in the State Court Action is separately attached to the Compendium as Exhibit "2."

7. In the course of discovery conducted in the State Court Action CJ produced a document entitled "eBay Affiliate Global Ts&Cs October 1, 2005," a true and correct copy of which is attached to the Compendium as Exhibit "3."

8. Although the document attached to the Compendium as Exhibit "3" is stamped "Confidential-Attorneys Eyes Only," counsel of record for CJ in the State Court Action,

Phillip Montoya, Esq. of Ernster Law Offices, P.C. confirmed that CJ does not object to the use or filing of such document in this action. A true and correct copy of Mr. Montoya's e-mail confirming the same is attached to the Compendium as Exhibit "11."

9. True and correct copies of eBay's First Request for Admissions, First Set of Special Interrogatories and First Request for Documents served on Defendant KFC are attached to the Compendium as Exhibits "4" through "6," respectively.

10. On April 20, 2009 and again on April 27, 2009, I entered the eBay website via the internet and obtained the eBay User Agreement, a copy of which is attached to the Compendium as Exhibit "7."

11. On March 23, 2009, CJ dismissed the State Court Action with prejudice as against the KFC Defendants. A true and correct copy of the Request for Dismissal is attached to the Compendium as Exhibit"9."

12. A true and correct copy of the Settlement and Mutual General Release Agreement, in the State Court Action, is attached to the Compendium as Exhibit "10."

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this 27th day of April, 2009 at Irvine, California.

LEO J. PRESIADO